**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| AT&T Corp. | ) | RM No. 10593 |
| | ) | |
| Petition for Rulemaking to Reform | ) | |
| Regulation of Incumbent Local Exchange | ) | |
| Carrier Rates for Interstate Special | ) | |
| Access Services | ) | |

# COMMENTS OF XO COMMUNICATIONS, INC.


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December 2, 2002

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**COMMENTS OF XO COMMUNICATIONS, INC.**

XO Communications, Inc., for and on behalf of its regulated subsidiaries (collectively "XO") provides the following comments on the AT&T Corp.("AT&T") Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services ("Petition"). XO fully supports the Petition. XO, like AT&T, is dependent on special access services from the incumbent local exchange companies ("ILECs"), particularly the Bell Operating Companies ("BOCs") for the facilities necessary to serve XO's customers. XO has experienced many of the same problems with special access services described in the Petition, and those problems have only worsened since the BOCs began to obtain pricing flexibility from the Commission. XO provides the following comments to supplement the points made in the Petition from the perspective of a carrier, unlike AT&T, whose business predominantly is the provision of *local* telecommunications service.

## DISCUSSION

If the Telecommunications Act of 1996 ("Act") were achieving its intended purpose, XO would have only a limited interest in this proposed rulemaking. XO provides a variety of telecommunications services to its customers, but XO's primary business is providing local telecommunications services to medium to large business customers. XO has metropolitan broadband fiber optic networks in more than 60 cities in the United States, including in the top 30 cities, and serves 26 of the largest metropolitan areas in the United States. XO, however, continues to rely on ILEC "last mile" and transport facilities to augment the network that XO has constructed. XO generally collocates in multiple ILEC central offices within the geographic areas in which XO provides service both to exchange traffic with the ILEC and to access the ILEC's network facilities.

Those ILEC network facilities *should* be available as unbundled network elements ("UNEs"), specifically high capacity (DS1 or DS3) loops and transport. XO uses such facilities predominantly to provide local service, and the Act and Commission rules require ILECs to make network facilities available as UNEs at rates based on total element long run incremental cost ("TELRIC"). As a practical matter, however, XO cannot obtain high capacity network facilities from the ILEC as UNEs in far too many instances but must order them out of the ILEC's FCC special access tariff. The ILECs are fully aware of – and make every effort to reinforce – competing local exchange company ("CLEC") dependence on ILEC special access services. The lack of Commission regulation of these services further insulates the ILECs' control over local markets and precludes development of effective local exchange competition and its attendant consumer benefits.

### 1. ILECs Refuse to Construct Facilities as UNEs and Provide Inferior Service in Order to Require CLECs to Purchase Special Access Services.

XO has constructed its own network to provide local telecommunications services, but neither XO nor any other facilities-based CLEC could hope to duplicate the network that the ILECs have built over decades as a monopoly service provider. XO constructs its own facilities when it is able to do so, but in the majority of cases, XO, like other CLECs, must obtain facilities from the ILEC to augment XO's backbone network, especially high capacity loop and related facilities needed to serve individual customers. XO's preference would be to obtain these facilities as UNEs, which are less expensive than the ILECs' tariff services and are governed under the provisions of XO's interconnection agreement. Too often, however, XO is unable to obtain the facilities it needs from the ILEC as UNEs.

The Petition focuses on economic issues, but economic viability is not the only restriction on the availability of high capacity UNEs. ILECs are increasingly denying CLEC orders for UNEs because allegedly no facilities are available and the ILEC refuses to construct such facilities to provide UNEs. "Construct," as used by the ILECs in this context, means to undertake virtually any work required of the ILEC other than designing and provisioning the ordered circuit, including augmenting or expanding existing electronics in the ILEC central office. The ILECs thus do not deny CLECs UNE orders only when it would require tearing up streets to lay new fiber. In most cases, the ILECs could undertake the necessary work entirely within the central office with minimal time and expense. Indeed, the ILECs will construct the facilities necessary to provide the exact same circuit that the CLEC has ordered as a special access or other tariff service, generally within the provisioning intervals established in the tariff.

Verizon has taken the lead among the ILECs in refusing to construct the facilities needed to provide UNEs. Emboldened by past Commission conclusions that its "no build" policy did not violate any existing Commission rules, Verizon has aggressively implemented and expanded this policy. Verizon has rejected fully *half* of the recent orders that XO has placed for high capacity UNEs because Verizon claims it lacks facilities and refuses to build them to provide UNEs. SBC quickly followed Verizon's lead. SBC has modified its own "no build" policy to be as restrictive as Verizon and currently rejects a comparable percentage of XO orders for high capacity UNEs for lack of facilities. Verizon and SBC, like the other ILECs, however, will build facilities to provide those same circuits as special access services.

If XO needs those facilities to serve its customers, XO has no realistic alternative to purchasing them from the ILEC as a special access service. XO would not have ordered the facilities from the ILEC at all if XO could have timely and economically built the facilities itself "from the ground up." Nor would XO order the facility from the ILEC if the same facilities were readily available from another provider. XO, therefore, must purchase the facilities from the ILEC as special access services, and as any rational actor would do, purchases those facilities at the best price available. The ILECs' best price, however, is not available without lengthy term (as long as five years) and substantial volume (as much as 95% or more of total circuits ordered) commitments. Such commitments further deepen XO's dependence on the ILEC's special access services not only for those circuits but for future facilities purchases.

The ILECs have made every effort to ensure that their "no build" policies have this effect. A CLEC ordering a special access service so that the ILEC will undertake the necessary facility construction encounters seemingly endless obstacles to any attempt to convert that service to UNEs. Specifically, as XO has previously explained to the Commission, the ILECs are "intransigent" in implementing the Commission's enhanced extended link ("EEL") requirements.[1] When requesting EEL conversions, XO has experienced endless negotiations, delayed conversion requests, threats from the ILECs to impose additional charges (*e.g.*, special access surcharges), and long provisioning intervals.[2] In the meantime, the CLEC would be paying full tariff rates (or would be required to pay substantial early termination liability) for the special access circuits.

The ILECs have not been deterred by the blatant discrimination posed by their refusal to build facilities for UNEs and willingness to build the exact same facilities for tariff services. To the contrary, the ILECs staunchly maintain this dichotomy, even to the point of attempting to prevent a CLEC from ordering tariff services when facility construction is required if the CLEC intends to convert those services to UNEs Until very recently, Verizon's template interconnection agreement characterized as "bad faith" and subjected to sanction any CLEC efforts to order, or to have its customers order, tariff services from Verizon in order to use the facilities Verizon constructs for UNEs:

> Except as otherwise required by Applicable Law: (a) Verizon shall be obligated to provide a UNE or Combination pursuant to this Agreement only to the extent such UNE or Combination, and the equipment and facilities necessary to provide such UNE or Combination, are available in Verizon's network; and (b) Verizon shall have no obligation to construct or deploy new facilities or equipment to offer any UNE or Combination. Consistent with the foregoing, should ***CLEC Acronym TXT*** engage in a pattern of behavior that suggests that ***CLEC Acronym

[1] XO *Ex Parte* Presentation, CC Docket No. 96-98, at 10 (filed Aug. 24, 2001)
[2] *See id.*

TXT*** either (i) knowingly induces Verizon Customers to order Telecommunications Services from Verizon with the primary intention of enabling ***CLEC Acronym TXT*** to convert those Telecommunications Services to UNEs or Combinations, or (ii) itself orders Telecommunications Services from Verizon without taking delivery of those Telecommunications Services in order to induce Verizon to construct facilities that ***CLEC Acronym TXT*** then converts to UNEs or Combinations, then Verizon will provide written notice to ***CLEC Acronym TXT*** that its actions suggest that ***CLEC Acronym TXT*** is engaged in a pattern of bad faith conduct. If ***CLEC Acronym TXT*** fails to respond to this notice in a manner that is satisfactory to Verizon within fifteen (15) Business Days, then Verizon shall have the right, with thirty (30) calendar days advance written notice to ***CLEC Acronym TXT***, to institute an embargo on provision of new services and facilities to ***CLEC Acronym TXT***. This embargo shall remain in effect until ***CLEC Acronym TXT*** provides Verizon with adequate assurances that the bad faith conduct shall cease. Should ***CLEC Acronym TXT*** repeat the pattern of conduct following the removal of the service embargo, then Verizon may elect to treat the conduct as an act of material breach in accordance with the provisions of this Agreement that address default.[3]

ILECs actually use their refusal to build UNE facilities, as well as longer provisioning and repair intervals for high capacity UNEs, as a marketing tool for their special access services. XO previously provided the Commission with an SBC presentation in which that ILEC used the superior service it provides when provisioning special access services to try to convince CLECs not to use UNEs[4]. SBC further claimed as part of that presentation that special access services are available at rates that allegedly are comparable to UNE prices but only if the CLEC enters into five year term commitments and commits to obtaining 95% or more of the high capacity circuits it purchases from the ILEC as special access circuits. The ILECs thus are using their

[3] Verizon Comprehensive Agreement, Version 2.6, Network Elements Attachment, Section 1.2 (September 2002). Verizon's current template agreement (Version 2.7) continues to provide that Verizon is not obligated to construct facilities to provide UNEs but no longer includes the quoted language after the first sentence.

pricing flexibility and the lack of Commission oversight of special access services to undermine the Act and to continue to monopolize local exchange markets.

### 2. High Capacity UNEs Are Not Economically Viable In Many Cases Under Current Commission Requirements.

The Petition identifies many of the other reasons why CLECs continue to be compelled to use ILEC special access circuits, rather than UNEs. XO began constructing its network during a time when the ILEC refused to provide high capacity circuits as UNEs. Only after the Commission specifically required the ILECs to offer such UNEs in the *UNE Remand Order* did the ILECs agree to make them available, but even then, the ILECs further delayed actual ordering and provisioning of high capacity UNEs for several months until they had developed the appropriate "products." In the mean time, XO had no alternative to obtaining the high capacity circuits it needed from the ILECs' special access tariffs.

Even after the ILECs actually began to make high capacity circuits available as UNEs, however, XO has been unable to take advantage of that availability to the extent contemplated by Congress. XO – like the ILECs themselves – has constructed local networks that transport traffic over common transport and loop facilities, integrating special access circuits with XO's own facilities to provide both local and interstate services. XO could not (and cannot) convert many special access circuits to UNEs because most of the ILECs refuse to provide UNEs if those facilities would be used, in whole or in part, to transport interstate traffic. Nor can XO order new circuits as UNEs in

[4] *In re Review of the Section 251 Unbundling Obligations of ILECs*, CC Docket Nos. 01-338, et al., Reply Comments of XO Communications, Inc., Ex. 1 (SBC's Special Access v. UNE Power Point Presentation) (July 17, 2002).

many instances in light of the ILECs' refusal to connect UNEs with special access circuits.

This prohibition on "commingling" severely constrains CLECs' ability to obtain access to high capacity UNEs, rather than special access services, to provide local exchange service to their customers. By way of illustration, a DS3 facility contains 28 DS1 circuits, which in turn provide the equivalent of 24 voice grade channels. A CLEC needing 10 or more DS1 circuits generally will obtain the entire DS3 facility because it is more cost efficient than ordering 10 individual DS1s. A CLEC that needs 10 DS1 circuits for local traffic and 10 DS1 circuits for special access traffic, for example, could use the same DS3 facility to provision all 20 of those circuits. The ILECs' requirement to segregate UNEs and special access circuits precludes such efficiencies and requires the CLEC to obtain two DS3 facilities – one for UNEs and one for special access – at double the cost. Not only does such a requirement unreasonably inflate CLECs' costs to compete with the ILECs but it forces CLECs to use network facilities they do not need, further increasing the likelihood that the ILECs will claim that they do not have facilities available.

A particularly egregious application of the prohibition on commingling is most ILECs' refusal to permit CLECs to route UNEs and tariffed services through the same multiplexer. A multiplexer is not a UNE but is a feature/functionality of transport or a loop that essentially allows multiple individual DS1 circuits to be aggregated onto a DS3 facility. A DS1 circuit from a customer location to an ILEC central office, for example, can be combined with other such circuits at a multiplexer in that central office, and the traffic from all of those circuits will be carried on a DS3 facility attached to the other side of the multiplexer to the CLEC's facility. Most ILECs refuse to permit CLECs to use the same multiplexer for both UNEs and special access DS-1 circuits, even though the DS3 facility could be used to carry both local exchange and special access traffic if the DS3 is routed through the CLEC's collocated equipment.

The practical result is that if XO wants to obtain high capacity circuits as UNEs in many situations, XO – unlike the ILECs themselves – must segregate and duplicate portions of its network to ensure that ILEC facilities used to provision UNEs are not connected to, or also used to provision, special access circuits. Similarly, if the CLEC does not collocate its own multiplexing equipment in the ILEC central office, a CLEC wanting to use UNEs must double the amount of multiplexing it obtains from the ILEC so that the same multiplexer is not used to provide both UNEs and special access circuits. High capacity UNEs often are not economically viable under those circumstances, and the only alternative for a facilities-based CLEC like XO is to obtain as special access services the facilities it needs to provide local exchange service.

## CONCLUSION

Past Commission decisions and the ILECs' profit-maximizing behavior have resulted in CLEC dependence on ILEC special access services for high capacity circuits. UNEs, as a practical matter, too often are not economically viable or are not available (or are not available under comparable terms and conditions). The ILECs obviously feel no constraints on their pricing, terms, and conditions for special access services when they know that CLECs have no alternative. If the Commission truly believes in the goals of the Act and the Commission's own rules and orders promulgated shortly after the Act's passage, the Commission will acknowledge the failure – at least for now – of its relaxed regulation of special access services and will once again actively oversee the rates, terms, and conditions under which the ILECs provide such services. For the foregoing reasons, as well as the reasons stated in the Petition, the Commission should grant the Petition.

Respectfully submitted,

XO Communications, Inc.

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